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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MAR 30 1992

Federal Communications Commission  
Office of the Secretary

In the Matter of )

Tariff Filing Requirements )  
for Interstate )  
Common Carriers )

CC Docket No. 92-13

COMMENTS OF  
KIN NETWORK ACCESS DIVISION

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March 30, 1992

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To: The Commission

COMMENTS OF  
KIN NETWORK ACCESS DIVISION

KIN Network Access Division, ("KNAD"), by its attorneys and pursuant to Section 1.415(b) of the Commission's rules, 47 C.F.R. §1.415(b), submits its Comments in the above-referenced docket.<sup>1/</sup> The purpose of this proceeding is to examine the Federal Communications Commission's ("FCC" or "Commission") policy of regulatory forbearance with respect to nondominant interstate common carriers ("IXCs"). The Commission is undertaking this review following a recent challenge to that policy.<sup>2/</sup> Specifically, the Commission seeks comments as to its legal authority for its policy of permitting, but not requiring, tariff filings by nondominant IXCs. KNAD believes that the Commission's long-standing policy of regulatory forbearance

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<sup>1/</sup> These Comments are timely filed. See, Notice of Proposed Rulemaking, CC Docket 92-13, FCC 92-35, released Jan. 28, 1992, 7 FCC Rcd. 804.

<sup>2/</sup> In the Matter of AT&T v. MCI, File No. E-89-297, Memorandum Opinion and Order, 7 FCC Rcd. 807 (1992).

promotes competition which benefits the public and is consistent with the Communications Act of 1934, as amended ("the Act") and therefore should continue.

#### I. BACKGROUND

1. KNAD has applied to the Commission for authority to construct and operate centralized equal access ("CEA") facilities to serve subscribers in Kansas.<sup>3/</sup> KNAD is a division of KIN Networks, Inc. and is owned by Liberty Cellular, Inc., which in turn is owned by independent local exchange carriers ("LECs"). These LECs serve sparsely populated areas which are costly to convert to equal access on an individual end office basis. KNAD was established in order to make equal access and associated services available to their customers. KNAD proposed aggregating equal access traffic at a central access tandem as well as other points of interconnection agreeable to competitive IXC's and itself so that rural Kansans would have a choice of IXC's. KNAD's interest in bringing competitive interexchange services to rural areas is the basis for its support for regulatory forbearance.

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<sup>3/</sup> In the Matter of KIN Network Access Division Application for Section 214 Authority, File No. W-P-C-6759, Public Notice Report No. D-615 (released Oct. 23, 1991)

II. THE FCC'S REGULATORY FORBEARANCE POLICY PROMOTES  
COMPETITIVE SERVICES AND IS CONSISTENT WITH THE  
STATUTORY OBJECTIVES OF THE COMMUNICATIONS ACT

2. The impetus for the series of "Competitive Carrier" decisions<sup>4/</sup> in which the Commission articulated its regulatory forbearance policies was the changing telecommunications marketplace. The Commission sought to relieve emerging competitive carriers from unnecessary regulatory burdens on the theory that these carriers, which did not have the power to dominate or monopolize the market, would be able to offer more competitive services to the public.<sup>5/</sup> KNAD believes such forbearance from tariff regulation promotes competition and should not be turned back.

3. The regulatory forbearance approach furthers the overriding statutory purpose of the Act, "to make available, so far as possible, to all the people of the United States a rapid, efficient Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges...." 47 U.S.C. §151. The Commission is statutorily obligated to "execute and enforce" the laws which promote this purpose, Id.

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<sup>4/</sup> In the Matter of Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252 (hereafter "Competitive Carrier").

<sup>5/</sup> Competitive Carrier, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980)

Specifically, it is authorized to "make such rules and regulations...as may be necessary in the execution of its functions," 47 U.S.C. §154(i).

4. The Competitive Carrier decisions removed regulatory requirements which impeded competition. The Commission used its discretionary authority to "forbear from the full panoply of regulation in instances where ... the costs of such regulation outweighed any perceivable benefits."<sup>6/</sup> The Commission's establishment of a plan of decreased regulation and regulatory forbearance was a proper exercise of these responsibilities, is not outside of the tariff proscriptions set forth in Section 203 of The Act and does not conflict with the overriding purpose of the Act. The tariff requirement contained in Section 203 requires in pertinent part:

203(a) Every common carrier, except connecting carriers, shall...file with the Commission...schedules showing all charges for itself and its connecting carriers... and showing the classifications, practices, and regulations affecting such charges....

47 U.S.C. §203 (1991)

5. The Commission was given discretion in overseeing enforcement of the tariff requirement in that same Section of the Act:

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<sup>6/</sup> Competitive Carrier, Second Report and Order, 91 FCC 2d 56, 61 (1982).

...(b)...(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or condition except that the Commission may not require the notice period...to be more than one hundred and twenty days.

6. In this instance the Commission is employing its discretionary authority pursuant to the Act to enable it to meet the changes in the communications environment, which were not foreseen by Congress. Under authority of Sections 4(i) and Section 203(b)(2), the Commission is modifying the tariff requirements for those carriers which do not have the market power to behave in an anticompetitive manner.<sup>7/</sup>

7. Critically, under the Commission's forbearance policy, its ability to enforce the Act's requirement of just and reasonable rates (Section 201 of the Act), and the Act's prohibition against discriminatory rates for like services (Section 202 of the Act) through the complaint process (Section 208 of the Act) is undiminished.<sup>8/</sup> These forborne carriers remain subject to regulatory constraints of Section 201 through 205 of the Act. <sup>9/</sup> Forborne carriers must offer services at

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<sup>7/</sup> As the Commission has noted, the court which ruled on its authority to prohibit nondominant carriers from filing tariffs was silent on the FCC's authority to permit carriers to not file tariffs MCI Telecommunications Corp.v. FCC, 765 F 2d 1191 (D.C. Cir. 1985).

<sup>8/</sup> Competitive Carrier, Second Report and Order, 91 FCC 2d 59, 70 (1982).

<sup>9/</sup> Id. at 69.

reasonable and non-discriminatory rates, regardless of whether or not they file tariffs with the Commission. Thus, the purpose of the tariff requirement is not eviscerated. Instead, its objective is achieved in a manner which facilitates the dissemination of communications services to the public, which is the overriding objective of the Act.

8. Insofar as the Commission's policy of regulatory forbearance is not in conflict with the Act's central purposes, it poses a different question than that presented in Maislin Industries, U.S. v. Primary Steel, Inc., 110 S. Ct. 2739, 2769 (1990) ("Maislin"), a case involving the Interstate Commerce Commission's ("ICC") ratemaking authority. In Maislin, the Court found that the ICC "Negotiated Rates" policy under which the ICC could refuse to order compliance with tariffed rates for common carriers if a private rate had been negotiated, was at odds with the overriding purpose of the ICC Act, and should not stand. This case appears to cast doubt on the FCC's legal authority to forbear from tariff regulation. However, there is a critical distinction between the operation of the FCC's policy of regulatory forbearance, (which does not favor a non-tariffed rate over a tariffed rate) and the ICC's Negotiated Rates policy, which declared a non-tariffed rate reasonable despite the existence of a tariffed rate, which, under the statute, should be presumed reasonable.

9. In Maislin, the Court found that the Negotiated Rate policy had undermined the statutory prohibitions against discriminatory rates, a central tenet of the statutory scheme. Maislin at 2768. Compare the FCC's policy, which affords certain carriers the option of not filing tariffs, but does not undermine the Commission's enforcement of reasonable rates, tariffed or nontariffed. In Maislin, the Commission's policy collides head-on with the ICC Act's requirement that tariffed rates be presumed reasonable; whereas, the FCC's policy of forbearance from tariff filing is not at odds with the Act's requirements of just and reasonable rates, and the tariff requirement of Section 203.

10. In sum, the Commission's policy of permissive tariff filing by nondominant interexchange common carriers promotes competitive services in a manner which does not conflict with the statutory purpose of the Communications Act.

Respectfully submitted,

KIN NETWORK ACCESS DIVISION

By: Marci E. Greenstein  
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Its Attorneys

March 30, 1992

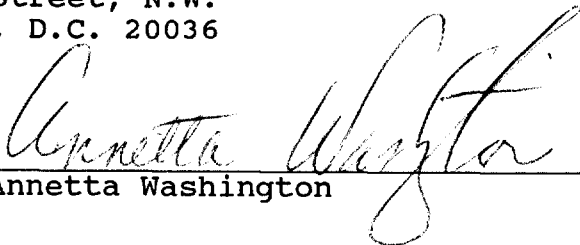


**CERTIFICATE OF SERVICE**

I, Annetta Washington, a secretary in the office of Lukas, McGowan, Nace and Gutierrez, Chartered, hereby certify, that I have on this 30th day of March 1992, sent via Hand Delivery, a copy of the foregoing **COMMENTS OF KIN NETWORK ACCESS DIVISION** to the following:

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